Brooklyn Law Review

Volume 85 | Issue 3 Article 6

6-25-2020

How Single-Candidate Super PACs Changed the Game and How to Change it Back: Adopting a Presumption of Coordination and Fixing the FEC's Gridlock

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ADOPTING A PRESUMPTION OF COORDINATION AND FIXING THE FEC'S GRIDLOCK

INTRODUCTION

In September 2015, a Gallup poll concluded that 75 percent of Americans perceived widespread corruption in the U.S. government.[1] This number is up from 66 percent in 2009.[2] While the Gallup poll does not define corruption, one thing is certain: Americans have consistently sought to root out corruption in D.C.,[3] and all three branches of government have attempted to do their part in combatting it.[4] Starting in 1907, President Theodore Roosevelt advocated for campaign finance reform, culminating in "the Tilman Act, which banned corporate contributions to political candidates."[5] In 1910, Congress enacted the Federal Corrupt Practices Act (FCPA).[6] During the next sixty-one years, Congress revised and extended the FCPA, which served as the country's

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[1] *75% in U.S. See Widespread Government Corruption*, GALLUP (Sept. 19, 2015), https://news.gallup.com/poll/185759/widespread-government-corruption.aspx [https://perma.cc/T3A2-NBEL].

[2] *Id.*

[3] During the 2016 election, Donald Trump popularized the phrase "drain the swamp." But, this phrase has been around for decades, being used by, for example, Ronald Reagan and even socialists, who sought to "drain the swamp" of capitalism. Ted Widmer, *Draining the Swamp*, NEW YORKER (Jan. 19, 2017), https://www.newyorker.com/news/news-desk/draining-the-swamp [https://perma.cc/6MFP-7CR4].

[4] *See* Charles Homans, *Americans Think 'Corruption' Is Everywhere. Is that Why We Vote for it?*, N.Y. TIMES MAG. (July 10, 2018), https://www.nytimes.com/2018/07/10/magazine/americans-think-corruption-is-everywhere-is-that-why-we-vote-for-it.html [https://perma.cc/28VX-U6LX] (noting "[a]n obsession with corruption is an American tradition . . . dat[ing] back to the founding fathers, who declared independence in part on the conviction that the British monarchy was wielding its expanding financial and patronage power to subvert the independence of Parliament").

[5] Kelly Ann Skahan, *Ineffective by Design: A Critique of Campaign Finance Law Enforcement in the United States, Australia, and the United Kingdom*, 27 WASH. INT'L L.J. 577, 579 (2018).

[6] *Important Dates: Federal Campaign Finance Legislation*, CTR. FOR PUB. INTEGRITY (May 19, 2014), https://www.publicintegrity.org/2004/03/25/5852/important-dates-federal-campaign-finance-legislation [https://perma.cc/YU38-LZCS].

basic campaign finance law until 1971.[7] In 1971, Congress passed the Federal Election Campaign Act (FECA), which repealed the FCPA and established a "comprehensive framework" that regulated, among other things, contributions from candidates and their families and allowed unions and corporations to solicit contributions from their members to be used in operating their political action committees (PACs).[8] But the following year's election and the Watergate scandal led Congress to pass amendments to the FECA in 1974 that revised "previously unenforced" spending limits and created stricter contribution limits.[9] These same amendments also instituted the campaign finance regulatory agency known as the Federal Election Commission (FEC).[10]

The federal judiciary has also expressed concern for corruption surrounding the political process.[11] The Supreme Court has consistently reiterated that the government has a legitimate interest in regulating campaign finance to prevent corruption or the appearance thereof.[12] But despite this concern, the Supreme Court has chipped away at FECA's, and its successor's—the Bipartisan Campaign Reform Act (BCRA)[13]—regulations over the past few decades.[14] Each regulation the Court has struck down has further facilitated the proliferation of independent expenditure-only groups, or Super Political Action Committees (Super PACs).[15]

In *Buckley v. Valeo*, the seminal 1976 Supreme Court case addressing campaign finance regulations, the Court made an all-important distinction between contributions (money paid *to* a candidate or an outside group) and expenditures (money spent *by* a candidate or an outside group).[16] The Court held that limiting expenditures posed greater First Amendment concerns than

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[7] In 1925, the FCPA expenditure limits and disclosure requirements were "[c]odified and revised"; in 1940 the Hatch Act Amendments limited individual contributions; in 1943 the Smith-Connally Act extended the contributions prohibition from corporations and interstate banks to unions; in 1947 the Taft-Hartley Act permanently banned "contributions to federal candidates from unions, corporations, and interstate banks, and extended the prohibition to include primaries as well as general elections." *Id.*

[8] *Id.*

[9] *Id.*; *see also* Skahan, *supra* note 5, at 580.

[10] *See* Skahan, *supra* note 5, at 580.

[11] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 26–27 (1976) (referencing the "deeply disturbing examples" of political *quid pro quo* corruption post-Watergate).

[12] *See infra* Section I.B.

[13] Clifford A. Jones, *Bipartisan Campaign Reform Act of 2002*, ENCYCLOPEDIA BRITANNICA (Mar. 20, 2020), https://www.britannica.com/topic/Bipartisan-Campaign-Reform-Act [https://perma.cc/B53A-Z4FD].

[14] *See infra* Section I.B.

[15] *See id.*

[16] *Buckley*, 424 U.S. at 19–21.

limiting contributions.[17] The series of cases that followed, including *Citizens United*, refined the contribution-versus-expenditure distinction, ultimately leading to the rise of Super PACs.[18] Super PACs are FEC-registered political action committees that may raise unlimited funds from individuals, corporations, and labor unions and can spend those unlimited funds in direct support of candidates.[19] While Super PACs can raise unlimited funds, an individual may contribute only $2,800 directly to a candidate.[20] Because coordination between a candidate and a Super PAC may lead to concerns surrounding *quid pro quo* corruption or the appearance thereof,[21] there are regulations in place that restrict Super PACs from coordinating with the candidates they support.[22] In reality, however, single-candidate Super PACs operate as an extension of the candidate's own campaign team.[23] Today, they are highly influential in the success or failure of a candidate's campaign.[24] Thus, their popularity continues to grow.[25] For example, in the 2016 election cycle, "188 Super PACs registered with the FEC to support or oppose one candidate[,] . . . nearly twice as many as in 2012."[26]

During the 2016 election cycle, many candidates, including "Jeb Bush, Carly Fiorina, John Kasich, and Scott Walker," filmed campaign footage before declaring their candidacies.[27] The footage, which discussed their achievements and qualifications, was later used by their respective Super

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[17] *Id.*

[18] *See infra* Section I.B.

[19] *Super PACs*, OPENSECRETS, https://www.opensecrets.org/pacs/superpacs.php [https://perma.cc/QJU5-W762].

[20] *Contribution Limits*, FED. ELECTION COMMISSION, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/contribution-limits/ [https://perma.cc/G2GK-Q6PU].

[21] The Supreme Court has held that the appearance of corruption is "[o]f almost equal concern" to *quid pro quo* corruption. *Buckley*, 424 U.S. at 27. Indeed, there is danger in "public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions." *The Court's Changing Conception of Corruption*, CAMPAIGN LEGAL CTR. (May 7, 2015), https://campaignlegal.org/update/courts-changing-conception-corruption [https://perma.cc/D5AP-TAHS]. For example, "[a] powerful corporation or individual need not buy votes outright, but rather can buy influence and access with the same result: preferential treatment from [legislators]." *Id.* Recently, however, the Court has narrowed its definition of corruption, "suggesting that gratitude and access are not corrupt but rather are inherent in representative government." *Id.*

[22] *See infra* Section II.B.

[23] Soo Rin Kim, *Mine All Mine: Single Candidate Super PACs, Creeping Down-Ballot*, OPENSECRETS (Nov. 10, 2016), https://www.opensecrets.org/news/2016/11/mine-all-mine-single-candidate-super-pacs-creeping-down-ballot/ [https://perma.cc/LGZ6-85VT].

[24] *See infra* Section II.A.

[25] *See id.*

[26] *See* Kim, *supra* note 23.

[27] Marc E. Klepner, Note, *When "Testing the Waters" Tests the Limits of Coordination Restrictions: Revising FEC Regulations to Limit Pre-Candidacy Coordination*, 84 FORDHAM L. REV. 1691, 1709 (2016).

PACs after the candidates declared their intention to run.[28] John Kasich's Super PAC, New Day for America, had a video on its website that featured Kasich telling potential Super PAC investors, "that's why I'm announcing that *we created* the New Day for America Committee . . . I hope you'll visit *our website* at NewDayforAmerica.com."[29]

Notably, many campaign activities, like candidate film footage, appear to be coordinated between PAC and candidate, but each is at most explicitly permitted within campaign finance regulations or has at the very least gone unenforced.[30] Ann Ravel, former chairwoman of the FEC,[31] and Ellen Weintraub, a current FEC Commissioner,[32] note that Supreme Court decisions and FEC inaction have "led to a proliferation of super PACs . . . many of which appear to be closely associated with particular candidates."[33] Ravel and Weintraub question whether FEC "regulations effectively ensure the independence of candidates and these outside groups, as required by the *Citizens Untied* decision."[34]

The FEC has routinely deadlocked when responding to questions about the scope of regulations and when reviewing and investigating complaints lodged against Super PACs.[35] Additionally, as of January 2020, three out of the six FEC Commissioner seats are vacant.[36] Thus, because the FEC requires four Commissioner votes to enforce rules, issue advisory opinions, or even hold meetings, it currently has no substantive enforcement power, rendering it "incapacitated" and "toothless."[37] Its consistent deadlock, and current inability to act, effectively greenlights activity that is actually illegal or that borders on illegality.[38] As to

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[28] *Id.*

[29] *Id.* at 1708–09 (emphasis in original).

[30] *See infra* Part II.

[31] *Ann M. Ravel*, FED. ELECTION COMMISSION, https://www.fec.gov/about/leadership-and-structure/ann-m-ravel/ [https://perma.cc/529S-NWT7].

[32] *Ellen L. Weintraub*, FED. ELECTION COMMISSION, https://www.fec.gov/about/leadership-and-structure/ellen-l-weintraub/ [https://perma.cc/DUJ8-RN4H].

[33] Letter from Ann M. Ravel & Ellen L. Weintraub to Fed. Election Comm'n 1–2 (June 8, 2015), https://www.fec.gov/resources/about-fec/commissioners/statements/Petition_for_Rulemaking.pdf [https://perma.cc/B5PH-NWNM] [hereinafter Ravel & Weintraub Letter].

[34] *Id.* at 8.

[35] *See, e.g.*, Paul Blumenthal, *FEC Deadlocks on Whether Candidates Can Coordinate With Their Own Super PACs*, HUFFPOST (Nov. 11, 2015), https://www.huffingtonpost.com/entry/fec-super-pac-coordination_us_56426ee7e4b060377346c337 [https://perma.cc/976W-UKGY]; *see also* Soo Rin Kim, *FEC Challenged Again to Find Coordination in Current Campaigns*, OPENSECRETS (Oct. 6, 2016), https://www.opensecrets.org/news/2016/10/fec-challenged-again-to-find-coordination-in-current-campaigns/ [https://perma.cc/27N2-5GD6].

[36] Soo Rin Kim, *FEC Left Toothless with Three Empty Seats Heading into 2020*, ABC NEWS (Aug. 27, 2019), https://abcnews.go.com/Politics/fec-left-toothless-empty-seats-heading-2020/story?id=65215840 [https://perma.cc/6F6M-SSZX].

[37] *Id.*

[38] *See infra* Parts II & III.

existing campaign finance regulations, Ravel has said that "[t]he likelihood of the laws being enforced is slim . . . . People think the FEC is dysfunctional. It's worse than dysfunctional."[39] And regarding the 2016 election in particular, she said that "she was resigned to the fact that 'there is not going to be any real enforcement.'"[40] Weintraub echoed that sentiment, noting that "[t]he few rules that are left, people feel free to ignore."[41] As a result, candidates are left free to push existing boundaries even farther.[42] Dave Levinthal of the Center for Public Integrity said that "[t]he fear factor is insanely low for all of these potential candidates because . . . the FEC . . . is so unlikely to penalize anyone."[43] The assumptions underlying the Supreme Court's reiterated reasoning that independent expenditures "[do] not *presently* appear to pose dangers of real or apparent corruption"[44] no longer holds true.

This note argues that single-candidate Super PACs, now operating as fundamental extensions of candidates' campaigns, pose *quid pro quo* corruption risks by acting as surrogates for donors who have maxed out on contributions made directly to a candidate. The Court's reasoning in *Citizens United* rested on an assumption of comprehensive regulation.[45] Ironically, since *Citizens United*, Super PACs and candidates frequently coordinate their activities because not only is the burden for proving a coordination violation set very high but also the FEC's enforcement structure is considered ineffective.[46] This note will prove that curbing the proliferation of coordination between candidate and Super PAC, and ultimately preventing corruption or the appearance thereof, requires the imposition of a burden of proof on either the candidate or Super PAC to prove an absence of coordination after the FEC has established that certain conditions have been met. To further improve enforcement, Congress should tweak the FEC's enforcement structure by

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[39] Eric Lichtblau, *F.E.C. Can't Curb 2016 Election Abuse, Commission Chief Says*, N.Y. TIMES (May 2, 2015), https://www.nytimes.com/2015/05/03/us/politics/fec-cant-curb-2016-election-abuse-commission-chief-says.html [https://perma.cc/3R26-LFHZ].

[40] *Id.* More serious concerns are being raised regarding the 2020 election given the FEC's inability to enforce any violations. *See, e.g.*, Editorial Board, *The Federal Election Commission Needs Commissioners*, BLOOMBERG (Sept. 20, 2019), https://www.bloomberg.com/opinion/articles/2019-09-20/fec-paralyzed-by-vacancies-as-2020-presidential-election-nears [https://perma.cc/4PRU-J4W6] (noting that "[a]n agency that was already weak is now paralyzed by vacancies").

[41] *See* Lichtblau, *supra* note 39.

[42] *See id.*

[43] David Catanese, *Blurred Lines: The Covert Funding of the 2016 Campaign*, U.S. NEWS (Feb. 13, 2015), https://www.usnews.com/news/articles/2015/02/13/blurred-lines-the-covert-funding-of-the-2016-campaign [https://perma.cc/H9CA-GEPW].

[44] Buckley v. Valeo, 424 U.S. 1, 46 (1976) (emphasis added).

[45] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 370 (2010).

[46] *See infra* Part II.

modeling it after California's Fair Political Practices Commission (FPPC), an organization widely regarded for its effective curbing of campaign finance violations and for preventing partisan gridlock.[47] Stricter regulations and more effective enforcement will produce increased deterrence, resulting in less coordination and heightened faith in the democratic system.[48]

Part I of this note will explore what a Super PAC is and address how single-candidate Super PACs became a necessary extension of a candidate's campaign by briefly reviewing the key Supreme Court cases that have slowly eroded Congress's campaign finance regulations. Part II will examine the proliferation of Super PACs alongside current anti-coordination rules. Part III will explore the FEC's ineffective enforcement and contrast it with California's anti-coordination regulations and enforcement body to demonstrate what federal anti-coordination regulations and enforcement should emulate. Finally, Part IV will propose a framework for deeming specific activity to be presumptively coordinated, while also doing away with the requirement that four FEC Commissioner votes are necessary to move into the investigative stage of a complaint.

I. THE BIRTH OF THE SUPER PAC: A CASE HISTORY

Before discussing the intricacies of candidate coordination with Super PACs, it is important to understand how Supreme Court decisions have slowly eroded Congress's campaign finance regulations, facilitating the rise of Super PACs and their now dominant influence in American politics.

A. What Is a Super PAC?

Super PACs are commonly known as "independent expenditure-only committees."[49] They are "independent" in that no spending can be coordinated with a candidate; they are "expenditure-only" because, while they can spend money advocating for or against a candidate, they cannot contribute directly to a candidate.[50] Corporations, unions, associations, and individuals can all contribute unlimited sums of money to Super PACs.[51] Super PACs can subsequently spend those unlimited

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[47] *See infra* Section III.B.
[48] *See infra* Part IV.
[49] *See Super PACs*, *supra* note 19.
[50] *Id.*
[51] *Id.*

sums of money to "advocate for or against political candidates."[52] Super PACs are also subject to regulations requiring them to disclose their donors to the FEC on a monthly basis during an election year.[53] Super PACs can support many candidates or a political party generally, while others throw all their support behind a single candidate.[54] The latter organizations are known as single-candidate Super PACs.[55]

While Super PACs can raise and spend unlimited sums of money, contributions directly to candidates are subject to strict limitations.[56] For example, individuals and non-multicandidate PACs can contribute no more than $2,800 per election to a particular candidate.[57] A multicandidate PAC can contribute $5,000 per election to a particular candidate.[58] Therefore, contributions directly to a candidate are drastically smaller relative to the amount of money that can be raised and spent by an independent organization supporting or opposing that same candidate.

B. Case History

Almost immediately after the President signed FECA into law, federal candidates, political parties, and organizations launched a comprehensive challenge against most of its provisions.[59] In 1976, the challenge reached the Supreme Court in *Buckley v. Valeo*.[60] Over forty years later, *Buckley* is still the "basic text against which any existing or proposed federal, state, or local campaign finance regulation must be tested."[61] *Buckley* is also a series of compromises.[62]

Arguably, the most important compromise reached by the Court is found in its differing treatment of contribution limits and

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[52] *Id.*

[53] *Id.*

[54] Michelle Merlin, *Single-Candidate Super PACs Post Mixed Record in Congressional Races*, OPENSECRETS (Nov. 8, 2012), https://www.opensecrets.org/news/2012/11/single-candidate-super-pacs-ineffec/ [https://perma.cc/KNZ3-DHUC].

[55] *2020 Outside Spending by Single-Candidate Super PACs*, OPENSECRETS, https://www.opensecrets.org/outsidespending/summ.php?chrt=V&type=C [https://perma.cc/X9JK-RAN6].

[56] *See Contribution Limits*, *supra* note 20.

[57] *See id.*

[58] *Id.*

[59] *See* Buckley v. Valeo, 424 U.S. 1, 6–8 (1976); *see also* LOWENSTEIN ET AL., ELECTION LAW: CASES AND MATERIALS 812–13 (6th ed. 2017).

[60] *See generally Buckley*, 424 U.S. 1.

[61] *See* LOWENSTEIN ET AL., *supra* note 59, at 814.

[62] *See, e.g.*, Buckley v. Valeo*, Forty Years Later*, CATO INST. (Mar./Apr. 2016), https://www.cato.org/policy-report/marchapril-2016/buckley-v-valeo-forty-years-later [https://perma.cc/B4Q6-XD8Z] (quoting Floyd Abrams, "one of the nation's leading First Amendment lawyers," who referred to *Buckley* as a "tolerable compromise").

expenditure limits.[63] In both cases, money contributed to "political speech," but the Court found that limiting expenditures posed a greater First Amendment risk than limiting contributions, because restrictions on expenditures "necessarily reduce[] the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached[,]" whereas the more money spent on a contribution, at most, "provides a very rough index of the intensity of the contributor's support for the candidate."[64] Therefore, any regulation limiting expenditures would be subject to greater constitutional scrutiny.[65] Since *Buckley*, courts have strictly adhered to this distinction, using it to strike down many expenditure regulations.[66]

Buckley's majority held that the government had a legitimate interest in limiting large contributions that could be "given to secure a political *quid pro quo*."[67] The Court recognized that limits were necessary "to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions."[68] The Court acknowledged that actively identifying incidents of corruption could "never be reliably ascertained" but pointed to the 1972 election as evidence that the problem was not "illusory."[69] Thus, as long as contribution limits were narrowly tailored to address this compelling interest, the Court would uphold them.[70]

Contrary to contribution limits, the majority found that the government did not have the same compelling interest "in preventing corruption and the appearance of corruption" when it came to expenditures.[71] FECA treated coordinated expenditures the same as contributions, meaning the provisions governing contributions similarly applied to coordinated expenditures.[72] Thus, FECA's expenditure limits targeted spending truly independent of a candidate and the candidate's campaign.[73]

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[63] *Buckley*, 424 U.S. at 19–21.

[64] *Id.*

[65] *Id.* at 23.

[66] *See infra* notes 77, 84, and 86.

[67] *Buckley*, 424 U.S. at 26.

[68] *Id.* at 28; *see also id.* at 26–27 (contributions "given to secure a political *quid pro quo* from current and potential office holders" undermines "the integrity of our system of representative democracy"); *id.* at 27 ("Of almost equal concern . . . is the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions.").

[69] *Id.* at 27.

[70] *See id.* at 28–30, 35–36.

[71] *Id.* at 45.

[72] *Id.* at 46–47.

[73] *Id.*

Because the expenditures at issue lacked "prearrangement and coordination," the danger of *quid pro quo* corruption did not exist.[74] Thus, the Court deemed the Act's independent expenditure limit unconstitutional.[75] Drawing a line between contributions and expenditures was the Court's first step in opening the door to an influx of expenditure-only committees.[76]

Two years later, the Court extended *Buckley* in *First National Bank of Boston v. Bellotti* by striking down a state statute forbidding corporations from spending money on referendum proposals.[77] While *Bellotti* did not involve candidate elections, the Court, in a footnote, left open the possibility of permissible regulation that prevented corporations from spending in candidate elections if Congress could demonstrate "a danger of real or apparent corruption in independent expenditures by corporations to influence candidate elections."[78] Two decades later, in *Austin v. Michigan Chamber of Commerce*, the Court leveraged the language from *Bellotti*'s footnote to uphold restrictions preventing corporations from using "corporate treasury funds for independent expenditures in support of, or in opposition to, any candidate."[79] The Court also expanded the type of corruption recognized as a compelling interest to include corrosion of the political process.[80] The Court again expanded the definition of corruption in *McConnell v. FEC* to include access and influence.[81] This came to a head in *Citizens United v. FEC* where the Court rejected these additional corruption interests.[82]

Citizens United involved a challenge to a federal law that "prohibit[ed] corporations and unions from using their general

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[74] *Id.* at 47.

[75] *Id.* at 51.

[76] *Buckley* only addressed expenditures and contributions made by individuals. *Id.* at 7. Later decisions would address expenditures and contributions made by corporations and unions. *See, e.g.*, McConnell v. Fed. Election Comm'n, 540 U.S. 93, 122 (2003) (expenditures from corporations and unions); Austin v. Michigan Chamber of Commerce, 494 U.S. 652, 654–55 (1990) (expenditures from for-profit corporation); Fed. Election Comm'n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 241 (1986) (expenditures from non-profit corporation).

[77] First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 767 (1978).

[78] *Id.* at 788.

[79] *Michigan Chamber of Commerce*, 494 U.S. at 654–55. However, corporations were allowed to make such expenditures from segregated funds (i.e., through PACs). *Id.*

[80] *See id.* at 659–60 ("Michigan's regulation aims at a different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas.").

[81] *McConnell*, 540 U.S. at 143–54 (2003) (noting specific examples of donations being used for access and influence); *see also* Fed. Election Comm'n v. Colorado Republican Fed. Campaign Comm., 533 U.S. 431, 441 (2001) (corruption interest also extends to "undue influence" on a candidate's judgement); Nixon v. Shrink Missouri Government PAC, 528 U.S. 377, 389 (2000) (adding "improper influence" and "opportunities for abuse").

[82] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359–61 (2010).

treasury funds to make independent expenditures" in support of, or in opposition to, a candidate.[83] Despite the more recent attempt by the Court to expand the definition of "corruption," the five Justice majority reverted to *Buckley*'s limited scope of *quid pro quo* corruption.[84] The Court conclusively held that influence and access "will not cause the electorate to lose faith in our democracy" because independent expenditures are, by definition, "not coordinated with a candidate."[85] The Court found the independent expenditure bans unconstitutional because they did not pose a risk of *quid pro quo* corruption.[86]

Despite rejecting the broader governmental interests in preventing corruption, the Court upheld disclaimer and disclosure requirements.[87] The Court struck down the expenditure ban but upheld the disclaimer and disclosure requirements because, the Court reasoned, Congress passed the regulations on findings "premised on a system without adequate disclosure."[88] But the Court said the modern campaign finance system "pairs corporate independent expenditures with effective disclosure."[89] In essence, the Court was confident in the robust checks and balances that reined in potential threats of corruption that large donors generally posed when contributing to candidates.[90] With independent expenditures, this corruption risk simply did not exist. This meant, in theory, that large donors contributing millions of dollars to a Super PAC would not be donating that money in exchange for something from the candidate because that organization had no relation to the candidate whatsoever.

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[83] *Id.* at 318–19.

[84] *Id.* at 359–60.

[85] *Id.* at 360.

[86] *Id.* at 357. Additionally, the Court noted that Congress did find evidence of soft money donations given to political parties that "were made to gain access to elected officials" but dismissed the finding because the issue in front of the Court focused solely on independent expenditures. *Id.* at 360–61. The four dissenters, however, would have held corrosion, influence, and access as valid governmental interests. *Id.* at 447 (Stevens, J., dissenting). Congress enacted BCRA "to target a limited set of especially destructive practices." *Id.* at 448.

[87] Disclaimer requirements "'provid[e] the electorate with information' about the sources of election-related spending." *Id.* at 367 (majority opinion). For examples of disclaimer requirements, see 52 U.S.C. § 30120(d)(2) ("_____ is responsible for the content of this advertising."); 52 U.S.C, § 30104(f)(1) (requiring disclosures to the Federal Election Commission for "electioneering communications" in excess of $10,000); *see also Citizens United*, 558 U.S. at 366 (summarizing additional BCRA disclaimer requirements).

[88] *Citizens United*, 558 U.S. at 370.

[89] *Id.*

[90] *See id.* at 371 ("The First Amendment protects political speech; and disclosure permits citizens and shareholders to react to the speech of corporate entities in a proper way. This transparency enables the electorate to make informed decisions and give proper weight to different speakers and messages.").

By striking down the independent expenditure ban, the *Citizens United* Court enabled corporations, unions, and individuals to spend an unlimited amount of money supporting or opposing a candidate.[91] Two months after *Citizens United*, the D.C. Circuit held, in *SpeechNow.org v. FEC*, that contributions to independent expenditure-only groups could not be limited.[92] The court's holding in *SpeechNow.org* definitively stated that "the government has no anti-corruption interest in limiting contributions to an independent expenditure group" because independent expenditures do not give rise to *quid pro quo* corruption or the appearance thereof.[93] By deeming any limits to independent expenditures unconstitutional, the Court opened the floodgates to the generation of Super PACs capable of raising and spending unlimited sums of money.[94]

II. PROLIFERATION OF SINGLE-CANDIDATE SUPER PACS

Citizen United's holding relied on the premise that the existing campaign finance system was comprehensive enough to ward away fears that independent expenditure-only committees were corruptible.[95] As single-candidate Super PACs play an ever more important role as an extension of a candidate's campaign, existing coordination regulations—which are intended to ensure that single-candidate Super PACs remain independent—often fail to achieve their desired goal by leaving campaign activity with a strong likelihood of coordination risk unaddressed.[96] Single-candidate Super PACs are often established and run by the candidate's close associates and typically hire the same vendors the candidate has employed.[97] One lobbyist noted that coordination is "a very common routine," and that "[m]any congressional candidates, and . . . all presidential candidates, coordinate with outside groups in one way or another."[98]

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[91] John Dunbar, *The 'Citizens United' Decision and Why it Matters*, CTR. FOR PUB. INTEGRITY (May 10, 2018), https://publicintegrity.org/federal-politics/the-citizens-united-decision-and-why-it-matters/ [https://perma.cc/4FJR-JH5W].

[92] SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 689 (D.C. Cir. 2010).

[93] *Id.* at 695.

[94] Montana attempted to distinguish its corporate spending ban by using facts that demonstrated the state's strong history of corruption through corporate independent spending. *See* Western Tradition P'ship v. Attorney Gen., 271 P.3d 1, 5–11 (Mont. 2011). When the case reached the Supreme Court, however, the Court issued a summary decision holding that Montana "fail[ed] to meaningfully distinguish" itself from *Citizens United* and struck down the state's ban. Am. Tradition P'ship v. Bullock, 567 U.S. 516, 517 (2012).

[95] *See supra* Section I.B.

[96] *See infra* Sections II.B–C.

[97] *See infra* Section II.C.

[98] *See* Kim, *supra* note 35.

A. Single-Candidate Super PACs: from "Must-have Accessory"[99] to "Integral Part of a Candidate's Campaign Machinery"[100]

When the Court decided *Citizens United*, total independent spending in federal elections rested at just over $200 million.[101] During the 2012 election cycle, that number exploded to hit over $1 billion, and in 2016 it rose again to almost $1.4 billion.[102] In 2012, 27 percent of total independent spending was sourced from single-candidate Super PACs; in 2016, that rose to 38 percent.[103] Interestingly, of the Super PACs that spent more than $100,000, 60 percent supported a single candidate.[104] And, while the number of Super PACs supporting a single candidate has continued to grow, the 2012 to 2016 election cycle saw a growth in single-candidate Super PAC spending of 78 percent ($268.6 million to $477.3 million).[105]

Given these staggering numbers, it is no surprise that it is considered crucial to the success of a federal candidate's campaign to have a Super PAC dedicated to supporting them for election or re-election.[106] Beginning in 2012, because of the sheer amounts of money Super PACs can raise, "major candidates were put at a serious competitive disadvantage if they were not

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[99] *See* Kim, *supra* note 23.

[100] *Id.*

[101] *Total Outside Spending by Election Cycle, Excluding Party Committees*, OPENSECRETS, https://www.opensecrets.org/outsidespending/cycle_tots.php?cycle=2018&view=A&chart=N#summ [https://perma.cc/8F6E-R6BK].

[102] *Id.*

[103] *See id.* (providing statistics on total independent spending: $1,002,145,869 in 2012 and $1,388,791,795 in 2016); *see also 2016 Outside Spending by Single-Candidate Super PACs*, OPENSECRETS, https://www.opensecrets.org/outsidespending/summ.php?cycle=2016&chrt=V&disp=O&type=C [https://perma.cc/7LDV-6LM6] (showing $530,768,314 spent by single-candidate Super PACs in 2016); *2012 Outside Spending by Single-Candidate Super PACs*, OPENSECRETS, https://www.opensecrets.org/outsidespending/summ.php?cycle=2012&chrt=V&disp=O&type=C [https://perma.cc/2KUK-3K4D] (showing $273,479,098 spent by single-candidate Super PACs in 2012).

[104] CHISUN LEE ET AL., BRENNAN CTR. FOR JUSTICE, AFTER *CITIZENS UNITED*: THE STORY IN THE STATES 10 (2014), https://www.brennancenter.org/sites/default/files/publications/After%20Citizens%20United_Web_Final.pdf [https://perma.cc/X8Q5-MT84].

[105] *See* Kim, *supra* note 23. As of June 11, 2020, 188 single-candidate Super PACs have been established for the 2020 election and have raised over $170 million to date. *See 2020 Outside Spending by Single-Candidate Super PACs*, *supra* note 55.

[106] *See* Matea Gold, *Can Super PACs Be Put Back in the Box?*, WASH. POST (July 7, 2016), https://www.washingtonpost.com/politics/can-super-pacs-be-put-back-in-the-box/2016/07/06/9beb18ba-43b1-11e6-8856-f26de2537a9d_story.html?utm_term=.76f1003cbe68 [https://perma.cc/PDR7-WGGU] ("Super PACs are now the norm in competitive federal races, with many formed to back a single candidate."); *see also* LEE ET AL., *supra* note 104 ("[I]n federal elections, support from candidate-specific super PACs has become a must-have.").

supported by at least one Super PAC."[107] Because of the lack of limits placed on these organizations, Super PACs often "outspend the candidates they support."[108] Thus conversely, they can outspend the candidates they oppose.

While the large amounts of money these independent committees are able to raise does not guarantee an election win, it does demonstrate their ability to influence elections.[109] For example, negative advertisements attacking a candidate's opponents can backfire on a candidate, but Super PACs can create and circulate these influential political advertisements without that same risk because they appear to be coming from a third party.[110] In 2012, Mitt Romney's Restore our Future Super PAC spent $142 million trying to unseat President Obama while President Obama's Priorities USA Action spent $65 million trying to keep him in office.[111] In 2016, Jeb Bush's Right to Rise USA Super PAC spent $87 million pushing for his Republican nomination bid.[112] To top them all, in 2016, Hillary Clinton's Priorities USA Action, repurposed from supporting President Obama, spent $132 million, while raising a "record-breaking $176 million."[113] Moreover, 76 percent of total independent money spent supporting Clinton was sourced from her Super PAC.[114] Because Super PACs have come to play such a "major role" in federal elections, "candidates' incentives to remain completely independent" from their dedicated Super PACs have diminished.[115]

While it is difficult to pinpoint what specific spending determined an election result, it is "widely accepted" that Super PACs "influence the political agenda, infiltrate the debate that customarily takes place between opposing candidates and political parties, communicate information that captures voters' attention,

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[107] Note, *Working Together for an Independent Expenditure: Candidate Assistance with Super PAC Fundraising*, 128 HARV. L. REV. 1478, 1483–84 (2015) [hereinafter *Working Together for an Independent Expenditure*].

[108] *Id.* at 1484.

[109] *See* Doug Schoen, *Super PACs' Super Influence and Their Destruction of Our Political System*, FORBES (Feb. 17, 2012), https://www.forbes.com/sites/dougschoen/2012/02/17/super-pacs-super-influence-and-their-destruction-of-our-political-system/#1e0095272406 [https://perma.cc/L6LR-6SP7].

[110] *See* Nathan Katz, *How Super PACs Shape U.S. Elections with Advertisements that Portray Candidates in Ways Publicly Identified Campaign Ads Often Avoid*, SCHOLARS (Jan. 22, 2019), https://scholars.org/contribution/how-super-pacs-shape-us-elections-advertisements-portray-candidates-ways-publicly [https://perma.cc/XR3V-5F75]; *see also* Schoen, *supra* note 109 (providing examples where attack advertisements from Super PACs have successfully fended off a candidate's opponent).

[111] *See* Kim, *supra* note 23.

[112] *Id.*

[113] *Id.*

[114] *Id.*

[115] *See Working Together for an Independent Expenditure*, *supra* note 107, at 1484.

and potentially affect voter decision making."[116] Because of this meaningful impact, it is no surprise that in 2016 one writer concluded that single-candidate Super PACs have morphed from "must-have accessor[ies]" to "integral part[s] of a candidate's campaign machinery."[117] In many cases, Super PACs "have all but assumed responsibility for some candidate campaign functions."[118]

B. Current Anti-Coordination Regulations for Super PACs

According to the *Citizens United* majority, single-candidate Super PACs are incorruptible and thus can raise and spend unlimited sums of money because, by definition, they are independent of, or not coordinated with, a candidate and his or her campaign.[119] To identify "coordination," the FEC looks at what the Super PAC spent money on—for example, a television advertisement—and then determines whether that communication was made at the behest of the candidate's campaign.[120] The Code of Federal Regulations defines "coordinated" as "made in cooperation, consultation or concert with, or at the request or suggestion of, a candidate, a candidate's authorized committee, or a political party committee."[121] To determine whether a communication is coordinated, the FEC looks to the (1) "source of the payment," (2) "subject matter of the communication," and (3) interaction between the Super PAC and the candidate.[122] The complainant carries the burden of proof in satisfying all three prongs.[123] When all three prongs have been satisfied, the communication is considered "a coordinated communication" that is functionally treated as a

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[116] PAUL S. HERRNSON, THE IMPACT OF ORGANIZATIONAL CHARACTERISTICS ON SUPER PAC FINANCING AND INDEPENDENT EXPENDITURES 3 (2017), https://bipartisanpolicy.org/wp-content/uploads/2019/05/The-Impact-of-Organizational-Characteristics-on-Super-PAC-Financing-and-Independent-Expenditures.pdf [https://perma.cc/33P9-MNHT].

[117] *See* Kim, *supra* note 23.

[118] Jim Miller, *New California Rules Meant to Deter Coordination in Campaigns*, SACRAMENTO BEE (Oct. 15, 2015), https://www.sacbee.com/news/politics-government/capitol-alert/article39362607.html [https://perma.cc/3GGF-6Q33].

[119] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 360 (2010) (holding independent expenditures are incapable of *quid pro quo* corruption); *see also* SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 696 (D.C. Cir. 2010) (holding "the government can have no anti-corruption interest in limiting *contributions* to independent expenditure-only organizations" (emphasis added)).

[120] *Coordinated Communications*, FED. ELECTION COMMISSION, https://www.fec.gov/help-candidates-and-committees/candidate-taking-receipts/coordinated-communications/ [https://perma.cc/GV8K-8ZM7].

[121] 11 C.F.R. § 109.20(a).

[122] *See Coordinated Communications*, *supra* note 120.

[123] *See generally* FED. ELECTION COMM'N, GUIDEBOOK FOR COMPLAINANTS AND RESPONDENTS ON THE FEC ENFORCEMENT PROCESS (2012), https://transition.fec.gov/em/respondent_guide.pdf [https://perma.cc/G9N8-RRAJ] [hereinafter FEC GUIDEBOOK] (describing in detail the steps the complainant and/or FEC must take to process, investigate, and prosecute a potential violation).

contribution to the candidate.[124] The candidate must subsequently report this "contribution" as an expenditure made by its campaign.[125]

The first prong is satisfied when an outside group, such as a Super PAC, pays for even part of a coordinated communication.[126] Generally, the second prong is satisfied when the communication references a federal candidate.[127] The final prong is where the coordination analysis comes into play.[128] The FEC has listed five ways in which coordination may occur.[129] For the purposes of this note, two will be explored in depth.[130] First is the "former employee/independent contractor" rule and the second is the "common vendor" rule.[131]

The former employee rule looks at whether the communication was paid for by a Super PAC that has a current employee who previously worked for the candidate or candidate's campaign within 120 days of "the purchase or public distribution of the communication."[132] But, the complainant must also prove two additional conditions. The former employee must have used or conveyed information about the candidate's campaign, and that information must have been "material to the creation, production or distribution of the communication."[133]

The common vendor rule is satisfied if the Super PAC used a commercial vendor,[134] which "has [had] a previous or current relationship with the candidate," "to create, produce or distribute [a] communication."[135] Similar to the former employee

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[124] *Coordinated Communications*, *supra* note 120.

[125] 11 C.F.R. § 109.20(b).

[126] *See Coordinated Communications*, *supra* note 120.

[127] There are five standards, any of which will satisfy this prong: a communication that (1) "is an electioneering communication"; (2) "republishes, disseminates, or distributes candidate campaign materials"; (3) "expressly advocates [for] the election or defeat" of a candidate; (4) "is the functional equivalent of express advocacy"; or (5) refers to a candidate or political party within a certain number of days of the election. *Id.*

[128] *Id.*

[129] *Id.*

[130] The FEC has determined that there are five ways of "coordinating": (1) the candidate or Super PAC "request[ing] or suggest[ing]" the communication; (2) the candidate's "material involvement" in the creation of the communication; (3) creating a communication after "substantial discussion" between the candidate and Super PAC; (4) sharing a "common vendor;" or (5) hiring a former employee. *Id.* The first three require evidence of specific "communications and conversations that took place, and usually those are not documented." Rachael Marcus & John Dunbar, *Rules Against Coordination Between Super PACs, Candidates, Tough to Enforce*, CTR. FOR PUB. INTEGRITY (May 19, 2014), https://publicintegrity.org/politics/rules-against-coordination-between-super-pacs-candidates-tough-to-enforce/ [https://perma.cc/XQB9-HEM4]. On the other hand, the last two methods will have more concrete evidence, making them an easier focus for purposes of this note. *See infra* notes 131–142.

[131] *Coordinated Communications*, *supra* note 120.

[132] *Id.*

[133] *Id.*

[134] *Id.*; *see also* 11 C.F.R. § 116.1(c).

[135] *See Coordinated Communications*, *supra* note 120.

rule, the common vendor must have performed services for the candidate "within 120 days."[136] The common vendor must also have "use[d] or convey[ed] information" about the candidate's campaign that was "material to the creation, production or distribution of the communication."[137] Therefore, the materiality conditions concerning both the former employee and common vendor rules significantly increase the burden for proving coordination, making violations harder to prove.

In addition to the high standard required to prove a violation, the FEC has also established a variety of safe harbor exceptions.[138] For example, if the information used in the communication was publicly available, such as candidate speeches or interviews, press releases, or the candidate's website, then the communication was not coordinated.[139] In addition, if the vendor or former employee implements a firewall that separates information from the candidate's campaign and the independent organization, then there is no coordination.[140] The firewall must "prohibit the flow of information between" common vendor employees providing services to the candidate and from those providing services to the candidate's Super PAC.[141] Pointing to the existence of a firewall, which is an inherently vague term,[142] is easy,[143] thereby increasing the burden of proof for establishing a coordination violation.

Given the great difficulty in proving a coordination violation, these "permissive" rules have been criticized for facilitating "a greater degree of candidate engagement."[144] This liberal view of coordination facilitates prearrangement and is ultimately detrimental to the effort to prevent *quid pro quo* corruption.[145] Furthermore, Congress enacted the coordination definitions and regulations prior to *Citizens United*.[146] Because Super PACs emerged *after* the *Citizens United* decision was

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136 *Id.*

137 *Id.*

138 *Id.*

139 *Id.*

140 *Id.*

141 *Id.*

142 *See* Shays v. Fed. Election Comm'n, 528 F.3d 914, 930 (D.C. Cir. 2008) (finding that "[t]he district court and Shays are undeniably correct that the regulation is vague as to what constitutes an acceptable firewall" and acknowledging that although "Shays doubts whether the Commission will enforce the safe harbor provision in a way that actually requires meaningful firewalls, [] as a court reviewing this facial challenge we must presume that the Commission will enforce its rule in good faith").

143 *See infra* Section II.C.

144 *See Working Together for an Independent Expenditure*, *supra* note 107, at 1488.

145 *Id.*

146 *Id.* at 1489.

handed down, the current reality of coordinated activities is unaccounted for in these regulations.[147]

A major reason for the lack of updated guidance results from deadlock within the FEC.[148] Even where candidates and political parties have asked the FEC for advisory opinions on coordination regulations, the FEC has failed to come to a consensus.[149] For example, in 2011, Super PAC American Crossroads asked the FEC "whether candidates could appear in the group's ads," but the FEC deadlocked, effectively green-lighting this coordination activity.[150]

Similarly, prior to the 2016 election, a lawyer for House Majority PAC and Senate Majority PAC asked the FEC for an advisory opinion on questions surrounding "whether candidates can coordinate with super PACs . . . prior to publicly announcing their candidacy."[151] House and Senate Democrats planned "to establish single-candidate super PACs for prospective candidates to coordinate with prior to officially announcing their candidacy."[152] Thus, the essential concern became "whether prospective candidates could form super PACs, staff them, create advertising materials for them, raise money for them and share strategy."[153] The FEC could not reach agreement, leaving would-be candidates free to engage in coordinated activity with their respective Super PACs prior to announcing their candidacy.[154]

C. Who Runs Super PACs and What Vendors Do They Employ?

Given the difficulty in proving coordination violations, it is no surprise that the current political ecosystem has been "mocked . . . for creating large loopholes that functionally allow coordination between candidates and Super PACs."[155] Often, this coordination is accomplished by the candidate or Super PAC employing a former employee of the other or by using the same vendor, such as digital advertising or email marketing agencies, to create its marketing materials.

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147 *Id.*

148 *See infra* Section III.A.

149 Paul Blumenthal, *FEC Deadlocks on Whether Candidates Can Coordinate With Their Own Super PACs*, HUFFPOST (Nov. 11, 2015), https://www.huffingtonpost.com/entry/fec-super-pac-coordination_us_56426ee7e4b060377346c337 [https://perma.cc/976W-UKGY].

150 *See* Kim, *supra* note 35.

151 *See* Blumenthal, *supra* note 149.

152 *Id.*

153 *Id.*

154 *Id.*

155 *See Working Together for an Independent Expenditure*, *supra* note 107, at 1478.

1. Former Employees

First, single-candidate Super PACs are occasionally established by the candidate themselves and often run by the "candidate's longtime aides or associates."[156] For example, Jeb Bush's Right to Rise Super PAC was led by Mike Murphy, "a top advisor during Jeb Bush's 1998 and 2002 gubernatorial campaigns."[157] Murphy even "credited Bush with creating part of the Super PAC's strategy."[158] To exploit the loophole left unaddressed by the FEC,[159] Bush extensively coordinated with his Super PAC prior to declaring his candidacy for President.[160] Murphy, a face already known to Bush donors, confirmed to those donors that he was coordinating with the unofficial Bush campaign.[161] Thus, Bush's Super PAC provided his donors an outlet where they could contribute unlimited sums of money in support of their preferred potential candidate.

Another example is Rick Scott's campaign for U.S. Senate, where his Super PAC hired Deborah Aleksander, Scott's former campaign consultant, and Melissa Stone, Scott's "former chief of staff and 2014 campaign manager."[162] This activity is not isolated to these two examples. Often, "[f]ormer campaign and government staffers,"[163] and even "top aides"[164] go to work for candidates' Super PACs "to help their candidates tap unlimited support from the outside."[165] Bush's top advisor and Scott's long-time fundraiser are no doubt familiar with high-spending donors who favor their respective candidates. Since contributions to candidates are capped, but contributions to Super PACs are not, fundraising efforts from those familiar with the candidate and

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156 Gold, *supra* note 106; *see also* LEE ET AL., *supra* note 104, at 8 (single-candidate Super PACs "often helmed by the candidate's former advisers and associates").

157 *See* Klepner, *supra* note 27, at 1707.

158 *Id.* at 1708.

159 *See supra* Section II.B.

160 *See* Klepner, *supra* note 27, at 1707–08. For an additional authority regarding suggested changes to "pre-candidacy" coordination regulations, *see generally* Emily M. Hoyle, Note, *A Pool of Candidates Who Refuse to Swim: The 2016 Presidential Election and the Demise of Testing the Waters*, 85 GEO. WASH. L. REV. 312, 335–46 (2017) (examining the loopholes that "pre-candidacy" regulations have created and proposing changes to the existing regulatory regime).

161 *See* Klepner, *supra* note 27, at 1707.

162 Anna Massoglia, *Rick Scott Super PAC Learns to Love Rick Scott*, OPENSECRETS (Aug. 28, 2018), https://www.opensecrets.org/news/2018/08/rick-scott-new-gop-super-pac/ [https://perma.cc/WW54-HSSZ].

163 *See* LEE ET AL., *supra* note 104.

164 *Strengthen Rules Preventing Candidate Coordination with Super PACs*, BRENNAN CTR. FOR JUST. (Feb. 4, 2016), https://www.brennancenter.org/analysis/strengthen-rules-preventing-candidate-coordination-super-pacs [https://perma.cc/M6CD-LGC4].

165 *See* LEE ET AL., *supra* note 104.

the candidate's campaign are better spent at organizations without contribution limits.

Finally, some former staffers have ignored the cooling-off period altogether. For example, "two top Trump staffers" formed the Super PAC Rebuilding America Now "almost immediately" after leaving Trump's campaign.[166] The Campaign Legal Center, a "nonpartisan, nonprofit organization" that advocates for campaign finance reform,[167] filed a complaint in 2016.[168] While as of January 2020 the current status of that particular action is unknown, the FEC has deadlocked on other violations lodged against Rebuilding America Now.[169]

2. Common Vendors

In addition to former employees jumping over to a candidate's Super PAC, candidates and their Super PACs are also sharing vendors more than ever.[170] An associate counsel at the Campaign Legal Center noted that "[s]haring vendors 'presents an easy way to undermine the independence of super PACs'" because "[t]he common vendor could operate as a conduit for information between the two."[171] In 2016, "66 single-candidate super PACs hired the same vendors or staff as the candidates they backed."[172] In 2012, there were 161 instances throughout the election cycle where candidates and their Super PAC "hired the same person or company."[173] In 2016, this number jumped to 632 instances.[174] The percentage of single-candidate Super PACs sharing vendors has increased "from 21.4 percent in 2012" to 45.5 percent in 2016.[175] Such shared information could include "where the campaign needs ads bought, what they want [those ads] to say or what voters to target."[176]

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166 *See* Kim, *supra* note 35.

167 *The Campaign Legal Center*, BALLOTPEDIA, https://ballotpedia.org/The_Campaign_Legal_Center [https://perma.cc/WG79-Y5JE].

168 *FEC Complaint: Make America Number 1 and Rebuilding America Now*, CAMPAIGN LEGAL CTR. (Oct. 6, 2016), https://campaignlegal.org/index.php/search?keys=%22Rebuilding+America+Now%22 [https://perma.cc/VZ25-R5L2].

169 Press Release, Fed. Election Comm'n, Statement of Reasons of Vice Chair Ellen L. Weintraub (Sept. 6, 2018), http://eqs.fec.gov/eqsdocsMUR/7135_1.pdf [https://perma.cc/B6G6-CAP8].

170 Ashley Balcerzak, *Candidates and Their Super PACs Sharing Vendors More Than Ever*, OPENSECRETS (Dec. 21, 2016), https://www.opensecrets.org/news/2016/12/candidates-super-pacs-share-vendors/ [https://perma.cc/A6MA-YJ87].

171 *Id.*

172 *Id.*

173 *Id.*

174 *Id.*

175 *See* Balcerzak, *supra* note 170.

176 *Id.*

Common vendor regulations are thought to be particularly easy to evade.[177] According to one lobbyist, a candidate's campaign and its Super PAC "can simply deny" sharing any information.[178] For example, "[a]n ad consultant can plan out campaign strategies with a candidate['s campaign]," wait 120 days, then "launch a super PAC . . . with all the necessary information in hand."[179] In 2016, Jeb Bush's campaign and his Super PAC both used Wisecup Consulting LLC for "political strategy consulting."[180] The firm's president "also served as the campaign's director of strategy."[181] Some speculate that this overlap may have led to Bush's confusion when he was quoted as saying in a radio interview, "[w]e started to advertise – actually the Right to Rise PAC started to advertise, not our campaign."[182] This shows the special interconnectivity that often exists between a campaign and its dedicated Super PAC.

Also in 2016, an FEC complaint alleged that Donald Trump's campaign "illegally coordinated with one of his [S]uper PACs, Make America Number 1."[183] The common vendor at issue was Cambridge Analytica,[184] which both the campaign and the Super PAC hired to identify voters and messaging.[185] Another common vendor the two entities shared was "The Polling Company, a firm led by Trump's campaign manager, Kellyanne Conway."[186] A week after the Super PAC paid almost $247,000 for survey research, "Trump's campaign spent $128,000 on polling."[187] In both situations, a "strict firewall" was alleged to have been in place, and, to date, no coordination violations have officially been found.[188]

Because these Super PACs are being run by confidants of the candidate and engage the same vendors to produce advertisements or other materials supporting their candidate, donors can "have confidence that their contributions will carry as

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177 *See* Kim, *supra* note 35.

178 *Id.*

179 *Id.*

180 *See* Kim, *supra* note 23.

181 *Id.*

182 *Id.*

183 *See* Balcerzak, *supra* note 170.

184 While Cambridge Analytica is now defunct, the District of Columbia sued Facebook for failing to protect 87 million users' information from Cambridge Analytica, which it used "to build psychographic profiles of American voters." Sheera Frenkel & Matthew Rosenberg, *Facebook Sued by District of Columbia Over Cambridge Analytica*, N.Y. TIMES (Dec. 19, 2018), https://www.nytimes.com/2018/12/19/technology/dc-sues-facebook-cambridge-analytica.html [https://perma.cc/Q8FH-QWSV].

185 *See* Balcerzak, *supra* note 170.

186 *Id.*

187 *Id.*

188 *Id.*

much weight as if they were contributing directly to the candidates' campaigns."[189] The coordination between Bush and his Super PAC prior to his declaring his candidacy no doubt contributed to the over $103 million his Super PAC raised just two weeks after declaring his candidacy.[190] After Bush declared his candidacy, his Super PAC's leadership reassured donors that while it was no longer able to coordinate with the Bush campaign, it was well informed as of two weeks ago and would continue pushing the Bush agenda.[191] Ultimately, activity that appears to invite *quid pro quo* corruption risk is either left unaddressed by the anti-coordination rules currently in place, or is left unenforced because of the high burden of proof the regulations require and because of the FEC's own shortcomings.

III. ENFORCEMENT: COMPARING THE FEC TO CALIFORNIA'S FAIR POLITICAL PRACTICES COMMISSION

Coupled with ill-tailored anti-coordination statutes,[192] actual enforcement of coordination regulations continues to decline because the FEC has become a dysfunctional regulatory agency.[193] Because the FEC's six, all-controlling Commissioners must vote to decide whether the FEC can launch an investigation into coordinated activity,[194] its partisan-line voting and current lack of a quorum to even hold a vote has contributed to the overall decline in FEC enforcement. Conversely, California's anti-coordination regulations and its enforcement agency, the Fair Political Practices Commission (FPPC), are widely regarded as effectively curbing coordination activity in California state elections.[195]

A. The FEC

The FEC has exclusive civil authority to enforce the financing of federal campaigns.[196] The FEC is comprised of six Commissioners who "are appointed by the President and confirmed by the Senate."[197] Notably, "no more than three Commissioners can represent the same political party, and" to

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189 *See* LEE ET AL., *supra* note 104.

190 *See* Klepner, *supra* note 27, at 1707.

191 *Id.*

192 *See supra* Section II.B.

193 *See* Lichtblau, *supra* note 39 (quoting Ann Ravel, former chairwoman of the FEC, as declaring the FEC "worse than dysfunctional").

194 *See infra* Section III.A.

195 *See infra* Section III.B.

196 *See* FEC GUIDEBOOK, *supra* note 123, at 4.

197 *Leadership and Structure*, FED. ELECTION COMMISSION, https://www.fec.gov/about/leadership-and-structure/ [https://perma.cc/6K44-Y3SU].

proceed with any official action, four Commissioners must vote in favor.[198] The supposed purpose is to "encourage nonpartisan decisions,"[199] but in practice, this has proven to result in deadlock.[200] Moreover, when three Commissioner seats are left vacant, as is presently the case, the FEC is left with even less substantive enforcement power.[201]

Once a complaint is filed, the enforcement process is carried out by the FEC's Office of General Counsel (OGC).[202] A complaint may be initiated by an individual that believes a violation "has occurred or is about to occur," by the FEC's audit division, by a referral from another government agency, or by an individual or entity who believes they may have violated a regulation.[203] A complaint alleging campaign finance violations moves through various stages: (1) "initial vote to proceed (reason to believe)"; (2) "investigation"; (3) "probable cause hearing"; and (4) "resolution."[204] While the OGC is responsible for moving a complaint through each stage, each stage qualifies as an official action.[205] Thus, four Commissioner votes are required to first "initiate an investigation," then "settle a matter," and finally "authorize filing a lawsuit."[206] If the Commission fails to reach four votes, or is prohibited from voting in the first place, the enforcement process ceases to continue.[207] Therefore, "party-line deadlocks" significantly reduce any chance that the complaint will move into the investigative stage.[208]

Furthermore, even if a campaign finance violation is found, "the Commission does not impose fines."[209] Instead, the Commission enforces violations "through voluntary settlements,"[210] called "conciliation agreement[s]."[211] However, the Commission must first

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198 *Id.*

199 *Id.*

200 Daniel P. Tokaji, *Beyond Repair: FEC Reform & Deadlock Deference*, *in* DEMOCRACY BY THE PEOPLE: REFORMING CAMPAIGN FINANCE IN AMERICA 172 (Eugene D. Mazo & Timothy K. Kuhner eds., 2018).

201 *See* Kim, *supra* note 36.

202 *See* FEC GUIDEBOOK, *supra* note 123, at 5.

203 *Id.* at 6–7.

204 *Id.* at 2, 5.

205 *Id.* at 5.

206 *Id.*

207 *Id.*

208 *See* Kenneth A. Gross, *The Enforcement of Campaign Finance Rules: A System in Search of Reform*, 9 YALE L. & POL'Y REV. 279, 286 (1991).

209 *See* FEC GUIDEBOOK, *supra* note 123, at 5. The Administrative Fine program, which "assesses civil money penalties for late and non-filed reports," is one limited exception. *Administrative Fines*, FED. ELECTION COMMISSION, https://www.fec.gov/legal-resources/enforcement/administrative-fines/ [https://perma.cc/3J7Y-U6UB]*; see also* FEC GUIDEBOOK, *supra* note 123, at 24–25.

210 FEC GUIDEBOOK, *supra* note 123, at 5.

211 *Id.* at 21.

approve the proposed settlement sent to the respondent, and a majority of Commissioners must approve the final agreement before it becomes effective.[212] If no settlement can be agreed upon, "the Commission . . . may file a civil lawsuit in U.S. District Court."[213] Each of these additional hurdles serves only to further diminish any possibility of a civil penalty being enforced.

Because of the FEC's partisanship, in approximately twenty years the FEC Commissioners have approved only three investigations regarding possible coordination between a candidate and independent expenditures made by individuals or organizations.[214] Out of the three investigations, only two resulted in fines.[215] Those fines totaled $26,000, a miniscule figure compared to the amounts of money campaigns and independent committees are able to raise and spend.[216]

Many have argued that the FEC's enforcement scheme, particularly the all-controlling Commissioners, prevents the FEC from adequately deterring violations.[217] Enforcement is an especially "daunting task in the face of entities that aggressively seek creative ways to evade the laws."[218] Because of the lack of adequate enforcement, many candidates and Super PACs "believe that the election laws need not be heeded."[219] Moreover, if a candidate or Super PAC is required to pay a civil penalty, it is imposed *after* an election.[220] These small penalties therefore "create little deterrent effect" and are viewed "as a small price to pay for winning [an] election."[221] Thus, campaigns and their Super PACs continue to push the boundaries of what qualifies as acceptable coordination activity, knowing that being fined or prosecuted for a violation is unlikely.

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[212] *Id.* at 20–21.

[213] *Id.* at 5.

[214] *See* Marcus & Dunbar, *supra* note 130.

[215] *Id.*

[216] *Id.*

[217] *See, e.g.*, Gross, *supra* note 208, at 284 (calling the FEC "rudderless and ineffective"); *see also* OFFICE OF COMM'R ANN M. RAVEL FED. ELECTION COMM'N, DYSFUNCTION AND DEADLOCK: THE ENFORCEMENT CRISIS AT THE FEDERAL ELECTION COMMISSION REVEALS THE UNLIKELIHOOD OF DRAINING THE SWAMP 1 (2017), https://www.fec.gov/resources/about-fec/commissioners/ravel/statements/ravelreport_feb2017.pdf [https://perma.cc/9VHD-R6CN] [hereinafter RAVEL FEC REPORT].

[218] *See* Gross, *supra* note 208, at 279. For example, pointing to a firewall is an easy way to defeat a common vendor coordination violation. *See supra* Section II.B.

[219] *See* Gross, *supra* note 208.

[220] *Id.*

[221] *Id.* at 286–87.

B. California's Coordination Regulations and the FPPC's Effective Enforcement

California's campaign finance law is governed by The Political Reform Act of 1974.[222] The Political Reform Act established the FPPC, the agency responsible for enforcing the Act's provisions.[223] Contrary to the Federal Government's reputation, California is well-regarded as having strict and effective campaign finance laws.[224] Specifically, "California's anti-coordination laws" are known to "effectively regulate the relationship between candidates and supporting PACs."[225] One of the FPPC's priorities is enforcement.[226] These laws' effectiveness has been recognized by other states that "have adopted similar laws to ensure" the independence of Super PACs from the candidates they support.[227]

California law generally defines "coordination" in the same terms as the FEC.[228] There is, however, an important distinction between California and federal anti-coordination regulations, namely, which party holds the burden of proof. Due to their complex elements and myriad exceptions, federal regulations make it difficult for a complainant to prove coordination.[229] But, in California, certain activities a candidate and its Super PAC engage in will be presumed coordinated.[230] For example, if a candidate's family members or former senior staff run the Super PAC, all expenditures made by the Super PAC are presumed coordinated.[231] This also includes situations where the Super PAC is "principally

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[222] FAIR POLITICAL PRACTICES COMM'N, STATE OF CALIFORNIA, ENFORCEMENT DIVISION MANUAL 3–4 (2018), http://www.fppc.ca.gov/content/dam/fppc/NS-Documents/EnforcementDiv/Information/Enforcement-Division-Manual.pdf [https://perma.cc/8DCT-BFCA] [hereinafter FPPC ENFORCEMENT DIVISION MANUAL].

[223] *Id.*

[224] Peter Burns & Matt Karlyn, *Introduction* to Randy Riddle, *Significant Developments in Election Law*, *in* NAVIGATING ELECTION AND POLITICAL LAW (2014) ("Perhaps no state has more complex election law and campaign finance laws than California."); *see also California's Coordination Regulations*, BLUEPRINTS FOR DEMOCRACY, http://www.blueprintsfordemocracy.org/model-coordination-regualtions/ [https://perma.cc/22QP-K9DR] (explaining what precisely differs between California's coordination regulations compared to "traditional[ ]" coordination laws).

[225] Eric J. Orona, Note, *Un-PAC-ing Campaign Finance Law in New Mexico*, 47 N.M. L. REV. 169, 170 (2017).

[226] *See* FPPC ENFORCEMENT DIVISION MANUAL, *supra* note 222.

[227] *See* Orona, *supra* note 225.

[228] *See* CAL. CODE REGS. Tit. 2 § 18225.7(c); s*ee also* Orona, *supra* note 225, at 178 (detailing California's definition of coordination and noting that it "is not much different from the federal definition").

[229] *See supra* Section II.B.

[230] *See* CAL. CODE REGS. Tit. 2 § 18225.7(d).

[231] *See* CAL. CODE REGS. Tit. 2 § 18225.7(d)(6)-(7); *see also California's Coordination Regulations*, *supra* note 224 (explaining the requirements for presumptively coordinated activity).

funded by an immediate family member."[232] Similar to the federal regulation, there is a cooling off period; however, instead of four months,[233] it is one year.[234] This effectively renders former staff unable to work for a candidate and the candidate's Super PAC in the same election cycle.

Another presumptively coordinated activity involves common vendors.[235] This presumption exists where the common vendor provides "professional services relating to campaign or fundraising strategy, and the group makes expenditures benefiting the candidate."[236] This goes for all services provided to the candidate in the same election cycle.[237]

A final example of presumptively coordinated activity is the republication or redistribution of "the candidate's campaign communications, including video footage."[238] But, campaign photos are still permitted to be used by outside spending groups.[239] Therefore, candidates are prohibited from filming footage for use by the campaign *and* the Super PAC.

In addition to having harsher restrictions, California also has a more effective enforcement structure. While the FEC has six Commissioners, California's Commission has five members, thereby preventing party-line gridlock.[240] Within the FPPC, "[t]he Enforcement Division is responsible for conducting investigations."[241] The Enforcement Division has control of moving the complaint through intake, investigation, and case resolution.[242] The Commission is not required to vote in order to move the complaint through these various stages.[243] Unlike the FEC, the FPPC's Commission sits only as an "adjudicator in enforcement cases."[244] Therefore, the Commission is unaware of the details regarding specific cases until the case reaches the Commission for

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[232] Caleb P. Burns & Eric Wang, *California Cracks Down on Coordination Through New Rules*, WILEY (Nov. 2015), https://www.wileyrein.com/newsroom-newsletters-item-California-Cracks-Down-on-Coordination-Through-New-Rules.html [https://perma.cc/2U22-SD6M].

[233] *See Coordinated Communications*, *supra* note 120.

[234] *See California's Coordination Regulations*, *supra* note 224.

[235] *See* CAL. CODE REGS. Tit. 2 § 18225.7(d)(3); s*ee also California's Coordination Regulations*, *supra* note 224.

[236] *See California's Coordination Regulations*, *supra* note 224.

[237] *See* LEE ET AL., *supra* note 104, at 18.

[238] *See California's Coordination Regulations*, *supra* note 224; *see also* CAL. CODE REGS. Tit. 2 § 18225.7(d)(4).

[239] *See* Burns & Wang, *supra* note 232.

[240] *About the FPPC*, CALIFORNIA FAIR POLITICAL PRACTICE COMMISSION, http://www.fppc.ca.gov/about-fppc.html [https://perma.cc/YG26-DEGL].

[241] *See* FPPC ENFORCEMENT DIVISION MANUAL, *supra* note 222.

[242] *Id.* at 14, 18–20.

[243] *Id.* at 14–20.

[244] *Id.* at 4.

adjudication.[245] Furthermore, the Commission "exerts no specific authority over a case's investigation, preliminary enforcement determination, or settlement negotiations."[246] Those functions are reserved specifically for the Enforcement Division.[247]

Once the Enforcement Division has completed an investigation, it can "propose a settlement to the Commission or pursue a formal enforcement action."[248] A formal enforcement action may include administrative penalties, including monetary penalties.[249] Finally, "the FPPC may seek enforcement through a civil action filed in court."[250] Ultimately, separation between the Commission and the Enforcement Division serves an important function: preventing partisan gridlock.

Experts have noted the impact that California's strict regulations have had on its political environment. For example, "Paul Ryan, senior counsel for the Washington, D.C.-based Campaign Law [sic] Center, said the California [anti-coordination] regulation sends an important post-Citizens United message."[251] He emphasizes that when state and local candidates see the impact that Super PACs have on the federal level, "it occurs to them that they can do that in the governor's race . . . [or] their state Assembly district race."[252] In other words, poor federal regulation and enforcement has a negative trickle-down effect that can infect state and local elections with coordination, and thus lead to corruption, across the country. Therefore, it is imperative that stricter regulation and enforcement laws be enacted at the federal level.

IV. PRESUMING COORDINATION FOR HIGH RISK COORDINATION ACTIVITY AND FOREGOING THE FEC'S VOTE TO ADVANCE VIOLATION INVESTIGATIONS

The Supreme Court approved independent spending organizations capable of raising and spending unlimited sums of money.[253] But the Court premised its decision on the fact that these organizations were independent of the candidates they support.[254] Without coordination between the two groups, there

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[245] *Id.*

[246] *Id.*

[247] *Id.*

[248] *See* Burns & Karlyn, *supra* note 224 (citing CAL. GOV'T CODE § 83116).

[249] *Id.*

[250] *Id.* (citing CAL. GOV'T CODE § 91013.5).

[251] *See* Miller, *supra* note 118.

[252] *Id.*

[253] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 365–66 (2010); SpeechNow.org v. Fed. Election Comm'n, 599 F.3d 686, 696 (D.C. Cir. 2010).

[254] *See supra* Section I.B.

would be no risk that candidates seeking votes could circumvent contribution limits by enticing large donors, who can contribute millions of dollars to the Super PAC, by offering these donors something in exchange. But, because the lines continue to blur as candidates lack any fear that the existing, weak anti-coordination regulations will be enforced,[255] the coordination regulations and the FEC's organizational structure are both in need of overhaul. Using California's regulatory framework and enforcement mechanism as a model, Congress should adopt regulations that deem specific activity as presumptively coordinated. Additionally, this regulation should dictate that violations qualifying under this coordination presumption should not require the FEC Commission's approval to proceed to the investigative phase. This will ultimately result in the more comprehensive regulation the Supreme Court envisioned when deciding *Citizens United* with the additional backing of tougher enforcement guarantees.

A. Coordination Presumption

The two categories of coordinated activity that should be deemed presumptively coordinated are those defined in the former employee and common vendor rules. Arguably, these two categories are particular areas of concern,[256] as it is with these activities where coordination, and thus corruption, is most likely.[257] Therefore, as with California's regulation, if the Super PAC hired, or was established by, the candidate's family member or by former employees of the candidate, the Super PAC would have the burden of showing that any expenditure it made was not coordinated. The same would hold true for any expenditures made for a common vendor that has performed services relating to campaign strategy. In addition, similar to California's regulation, there should be a one-year cooling off period so that former staff and common vendors are unable to work for a candidate and the candidate's Super PAC in the same election cycle. This permits people to move from job to job while simultaneously reducing the risk of the exchange of pertinent and relevant information between candidate and Super PAC.

Therefore, where the allegations against the Trump campaign did not progress because the common vendor could simply point to a firewall,[258] under a presumption of coordination, this would not be enough to *disprove* that any coordination had

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[255] *See supra* Part II.

[256] *See, e.g.*, Kim, *supra* note 35 ("the vendor provision is particularly elastic").

[257] *See supra* Section II.C.

[258] *See* Balcerzak, *supra* note 170.

taken place. This burden-shifting would ultimately force candidates and their Super PACs to truly ensure—and document—that no coordination had in fact taken place, in turn reducing the abundance of coordination understood to be currently taking place.[259]

Former FEC Commissioners have also advocated for tighter coordination "rules that deem all spending by outside groups that effectively operate as 'the alter ego of a candidate' as coordinated spending."[260] These former Commissioners also acknowledge that these tighter rules, which ensure the independence of Super PACs, are what is "required by *Citizens United* and its progeny."[261] Despite this acknowledgement, and an appellate court ordering the FEC "to fill in the statutory gaps,"[262] the agency has "blow[n] past deadlines," failing to fix the problem.[263] Thus, Congress must step in to implement these key portions of California's presumption of coordination regulations at the federal level.

Finally, despite the fact that the 116th Congress has a Republican controlled Senate,[264] campaign finance reform is not a partisan issue. Both Democrats and Republicans have historically supported various campaign finance reforms, most notably, the Bipartisan Campaign Reform Act.[265] Additionally, while the coordination presumption places an added burden on the candidate and Super PAC, it does not ultimately further restrict speech, thereby avoiding First Amendment concerns. Shifting the presumption serves to strengthen the underlying concerns that even the more conservative *Citizens United* Court had—that unlimited independent expenditures are not to be restricted, so long as the spending is truly independent and there is no coordination between candidate and Super PAC.[266]

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[259] *See supra* Section II.B.

[260] *See* Ravel & Weintraub Letter, *supra* note 33, at 8.

[261] *Id.* at 4.

[262] Van Hollen, Jr. v. Fed. Election Comm'n, 811 F.3d 486, 495 (D.C. Cir. 2016).

[263] *See* Kim, *supra* note 35.

[264] *Party Division*, U.S. SENATE, https://www.senate.gov/history/partydiv.htm [https://perma.cc/SC5T-MGWW].

[265] *See* Jones, *supra* note 13.

[266] *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 357 (2010) (concluding that independent expenditures "do not give rise to corruption or the appearance of corruption" because "[t]he absence of prearrangement and coordination . . . alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate" (quoting Buckley v. Valeo, 424 U.S. 1, 47 (1976)) (alterations in original).

B. Organizational Changes to the FEC

Congress should also adopt the FPPC's protocol for moving a complaint to the investigative stage.[267] Because of the FEC's inability to effectively enforce existing federal anti-coordination regulations,[268] there should be no vote required to move a complaint through the various stages of enforcement, particularly the investigative phase. Switching the presumption *and* removing the vote ensures a higher likelihood that the agency can effectively regulate improper coordination activity. At the very least, a formal investigation can more readily be launched, which guarantees the OGC an opportunity to develop a comprehensive factual basis for deciding whether to pursue penalties. Additionally, when the FEC does not have a quorum to even hold a vote, a formal investigation can nonetheless proceed. Placing the decision of whether to move forward with the OGC, as California's FPPC does with its Enforcement Division, removes the potential for almost certain party-line deadlock. And while a completed investigation does not guarantee a ruling from the Commission on an apparent violation, at the very least the FEC will initiate more than the three investigations it has to date.[269] Ultimately, forcing the OGC to initiate an investigation and develop a record will make it a more legitimate, effective, and productive agency even when Commissioner vacancies remain unfilled.

Some scholars fear that putting the burden on candidates to disprove coordination would encourage an influx of unsupported complaints motivated by the desire to cause political damage.[270] However, the OGC would still be required to evaluate the complaint and the response to determine which matters to pursue and which to dismiss, thereby weeding out baseless complaints.[271] Similar to the FPPC's enforcement mechanism, removing the Commission's vote to proceed to the investigative stage ensures that the Commission makes enforcement decisions based upon a developed record supporting, or undercutting, the complaint's allegations. Knowing the FEC is more likely to investigate previously harder-to-prove coordination allegations will put future candidates on notice that evidence of coordination will be collected more readily.

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[267] *See supra* Section III.B.

[268] *See* Lichtblau, *supra* note 39.

[269] *See* Marcus & Dunbar, *supra* note 130.

[270] *See, e.g.*, James Bopp, Jr. & Richard E. Coleson, *The First Amendment Needs No Reform: Protecting Liberty from Campaign Finance "Reformers,"* 51 CATH. U. L. REV. 785, 807 (2002) ("If coordination is broadly defined, then many political activities would prompt complaints to the FEC that would become burdensome investigations to determine whether coordination has occurred . . . . The investigation itself could become a punishing burden.").

[271] *See* FEC GUIDEBOOK, *supra* note 123, at 11.

This second enforcement component is required for overall success in enforcing coordination violations because it improves deterrence. It is clear that in today's federal campaign environment, candidates and their supporting Super PACs have little to no fear of enforcement.[272] One lobbyist noted that "[t]he FEC receives scores of complaints alleging coordinated communications every election cycle, but [the Commissioners] hardly ever pursue any of them."[273] Moreover, since January 2020, the Commission has been prohibited from pursing complaints because it lacks the minimum four Commissioners required to hold a vote, resulting in even less of a fear of enforcement.[274] When there is a vote, partisan splits effectively prevent the FEC from "enforcing its own rules."[275] Between 2006 and 2016, deadlocked votes grew "from 0.9 percent to 21 percent"; in 2016, 209 cases were "abandoned without any conclusion."[276] But experts have deemed deterrence "essential to making existing reforms and rules even moderately effective."[277] Some have argued that "[e]ven the most comprehensive coordination law will not deter violations without adequate and sensible enforcement."[278] In 2015, the FPPC's Commissioner said that "[i]n a perfect world we don't have more enforcement cases, we have compliance."[279] While certain political players will always try to push the envelope of what is legal, stricter regulations and enforcement create an environment of compliance and makes those willing to violate coordination regulations a readily apparent anomaly. Therefore, removing deadlock within the FEC when it comes to processing a coordination violation is essential to the success of any proposed federal regulation that requires official action within the Commission.[280]

CONCLUSION

It is widely recognized by Congress,[281] the Supreme Court,[282] and experts, that "contributions funding independent spending [ ]

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[272] *See supra* Sections II.C–III.A.
[273] *See* Kim, *supra* note 35 (second alteration in original).
[274] *See* Editorial Board, *supra* note 40.
[275] *See* Kim, *supra* note 35.
[276] *Id.*
[277] *See* LEE ET AL., *supra* note 104, at 3.
[278] *Id.* at 4.
[279] *See* Miller, *supra* note 118.
[280] *See* Tokaji, *supra* note 200; RAVEL FEC REPORT, *supra* note 217.
[281] *See supra* notes 5–10.
[282] *See supra* Section I.B.

can indeed spawn corruption both directly and indirectly."[283] Despite this recognition, the principles established in *Citizens United* and *SpeechNow.org*—mainly that these organizations are truly independent of the candidate[284]—"have been proven to be dramatically wrong."[285] According to Professor Laurence Tribe, campaign finance regulations severely limit individual contributions to a candidate's campaign, but these regulations are easily "evaded by giving millions to super PACs . . . [,] [and] [t]he Supreme Court never approved anything like that."[286]

To deter the pervasive coordination activity happening today, particularly from single-candidate Super PACs acting as a conduit for large donors contributing to candidates, Congress should enact legislation switching the burden to presume that certain activity automatically qualifies as coordination between the candidate and its Super PAC. But, because of the FEC's gridlock, Congress must also alter the FEC's enforcement structure by getting rid of the four-vote requirement in processing a campaign violation complaint. This will ultimately increase enforcement of violations and deter such underhanded coordination, resulting in a campaign finance system resembling what both Congress and the Supreme Court had envisioned. With these changes in place, the American people's concerns surrounding corruption in politics, those that damage our trust in government and its legitimacy, will finally be addressed by the organization Congress tasked with doing so.

Sarah E. Adams[†]

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[283] Richard Hassen, *Of Super PACs and Corruption*, POLITICO (Mar. 22, 2012), https://www.politico.com/story/2012/03/of-super-pacs-and-corruption-074336 [https://perma.cc/4KFG-XPD8].

[284] *See supra* Section I.B.

[285] *See* Gold, *supra* note 106.

[286] *Id.*

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